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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. .....

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION, TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in case No. 12,568 on June 15, 1961.

Opinions Below.

The opinion of the Court of Appeals (*infra*, pp. A-1-A-8) is not yet reported. The orders of the Federal Power Commission (R. 133-145, 153-161) are reported at 18 F. P. C. 617 and 19 F. P. C. 74.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 15, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 15 U. S. C. §717r(b).

Questions Presented.

In passing on the enforceability of a privately negotiated gas purchase contract which was executed by the seller in Texas and thereafter by the buyer in the District of Columbia, but which was to be performed wholly in the State of Louisiana and which was on file with the Federal Power Commission as a rate schedule under the Natural Gas Act, the Court of Appeals resolved the issue on the basis of federal substantive law (which it characterized as "general contract doctrine", *infra,* p. A-7) rather than on the basis of the law of Louisiana. In so doing, the court found it unnecessary to discuss the law of Louisiana which it assumed to be the same as the general contract doctrine which it applied.

The questions presented are:

1. Whether enforceability of a privately negotiated contract for the sale of natural gas to be performed in the State of Louisiana, and which contract is filed with the Federal Power Commission as a "rate schedule" pursuant to the Commission's regulations under the Natural Gas Act, is governed by the law of Louisiana (the place of performance) or by federal substantive law.

2. Whether, assuming Louisiana law governs, the Court of Appeals erred in assuming Louisiana law to be the same as federal substantive law and that Louisiana law "does not differ from general contract doctrine" (*infra,* p. A-7).

3. Whether, assuming Louisiana law governs, federal court action should be held in abeyance until the issue of enforceability is resolved by the Louisiana court in a pending case between Shell and Texas Gas involving that very issue.

Statement.

This case was previously before this Court in *Texas Gas Transmission Corporation, et al.* v. *Shell Oil Company*, 363 U. S. 263 (1960). The judgment below resulted from further proceedings in the Court of Appeals as a result of this Court's reversal and remand of a previous judgment by that Court.

The ultimate issue is what was the effective price on June 7, 1954 under a 1951 gas sales contract between Shell, seller, and Texas Gas' predecessor, buyer.[1] The dispute centers on whether the price escalation clause in the Shell contract was activated by an agreement dated February 17, 1954 between Texas Gas and The Atlantic Refining Company.

The price escalation clause in the 1951 Shell contract provides (R. 63-64):

> "3. If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than

[1] Louisiana Natural Gas Corporation (a wholly owned subsidiary of Texas Gas) was the original buyer in the Shell contract. The corporations merged in 1955 (R. 134). The buyer will be referred to as Texas Gas or the pipeline.

> the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *"

At the time of entry into the 1951 Shell contract, Texas Gas was also buying gas in the same area from The Atlantic Refining Company under a contract (the "Atlantic contract") which had been executed on September 1, 1943.[2] The Atlantic contract covered gas to be produced from the North Tepetate Field, Acadia Parish, Louisiana, with the gas to be delivered at a central point in that field (R. 82). The Atlantic contract was executed by Atlantic on September 11, 1943 in Dallas County, Texas, and by Defense Plant Corporation on September 17, 1943 in the District of Columbia (R. 97-98).

The Atlantic contract, which provides that "the rights of the parties" are to continue for the producing life of the field but not to exceed 25 years (R. 92), fixed a definite price for the first five years (R. 86) but no price was fixed for subsequent periods. Rather, the contract provided (R. 87):

> "(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

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[2] Initially this contract was between Atlantic, seller, and Defense Plant Corporation, buyer, but Texas Gas through its subsequently-merged subsidiary had acquired all of the rights and assumed all of the obligations of Defense Plant Corporation on May 11, 1949 (R. 109-110).

"(c) During succeeding five-year periods prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."[3]

By written agreements the parties to the Atlantic contract agreed upon the price for gas to be paid during the second five-year period of the contract (R. 99-100, 102-109). In fixing the price for the second five-year period it was agreed that such fixed price would expire on August 31, 1953 (R. 104). By letter dated August 27, 1953 (four days before the prior price agreement terminated) Texas Gas wrote to Atlantic advising that the prior price provisions

[3] Condition XII reads (R. 93-94):

"* * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.

"* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same."

would expire on August 31, 1953, and notified Atlantic of its willingness to commence negotiations concerning the price for the succeeding five-year period (R. 30-31). Commencing in September 1953 negotiations took place looking toward agreement on price between Atlantic and the pipeline. At least four meetings were held and there were numerous telephone conversations. Negotiations stretched over a period of approximately five and one-half months and finally culminated in a written agreement dated February 17, 1954 (R. 17, 37-38). This agreement fixed the price at 12.2¢ per Mcf, plus tax reimbursement, for the period beginning September 1, 1953 and ending August 31, 1958. At that time Shell was receiving 8.997¢ per Mcf for its gas being delivered to the pipeline. The February 1954 agreement, which petitioner contends activated the Shell price escalation clause, reads as follows (R. 37-38):

> "Under date of September 1, 1943, Defense Plant Corporation, as Buyer, entered into a gas purchase contract with The Atlantic Refining Company, as Seller, for the purchase of gas produced from Seller's leases in the North Tepetate pool of Acadia Parish, Louisiana, which contract was subsequently amended February 16, 1949. Louisiana Natural Gas Corporation purchased the pipe line operated by Defense Plant Corporation and the aforesaid contract with The Atlantic Refining Company was assigned to Louisiana Natural Gas Corporation.
>
> "In accordance with Paragraph III of said contract, it is hereby agreed that the price to be paid by Louisiana Natural Gas Corporation to The Atlantic Refining Company for gas sold and delivered under such contract between September 1, 1953, and August 31, 1958, both inclusive, shall be 12.2 cents net for each 1,000 cubic feet at a pressure base of 15.025 psia of gas received at the central point or points set forth in the original contract, regardless of whether such gas is delivered to a government plant or not; and,

> in addition, Buyer shall reimburse Seller for all State severance taxes, or similar taxes, which Seller is obligated to pay and has paid to the State of Louisiana on such gas."

Pursuant to the Commission's regulations, Shell filed its 1951 contract as a rate schedule, claiming that its effective rate on June 7, 1954 was the same as that specified in the February 17, 1954 agreement. The Commission set the matter for hearing to determine the effective June 7, 1954 rate under the Shell contract (R. 116-117). The Presiding Examiner agreed with Shell, concluding that the February 17, 1954 agreement activated the Shell price escalation clause (R. 118-133). The Commission reversed its Examiner (R. 133-145, 153-161). The Court of Appeals vacated the Commission's order and remanded to the Commission for further proceedings (263 F. 2d 223). This Court granted certiorari (*Texas Gas Transmission Corporation, et al. and Federal Power Commission* v. *Shell Oil Company*, 361 U. S. 811), reversed the judgment of the Court of Appeals, and remanded for further proceedings (363 U. S. 262, 277).[4]

On remand, the court below concluded that the enforceability issue was most material, but affirmed the order of

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[4] In the course of the opinion, and with respect to the remand, this Court stated (363 U. S. 276-277):

> "There remains for mention an argument of Shell which the Court of Appeals found unnecessary to consider because of the rationale which it adopted. This is the contention that the 1943 Atlantic agreement did not provide for a fixed and determined price beyond the first five-year period, so that under applicable state law enforceability was suspended until the contract price for a particular succeeding five-year term was supplied by agreement or arbitration. From this premise it is argued that when the second five-year period came to an end on August 31, 1953, neither Atlantic nor Texas Gas was under any enforceable obligation to continue the prior relationship and therefore when on February 17, 1954, Texas Gas signed the letter agreement it was not acting pursuant to any pre-existing obligation but was exercising its free choice to enter what was in effect a new contract. In its petition for writ of certiorari the Commission argued that not only was there no doubt about the

the Commission. The Court of Appeals observed that its primary responsibility was to determine whether the 1943 Atlantic contract was enforceable as to its third five-year term. The court stated that "[t]he answer to this lies in the pact's arbitration clause", *infra*, p. A-5. The court below concedes that Shell's contention as to the unenforceability of the Atlantic contract would be correct if the arbitration procedure provided for in the Atlantic contract might never have resulted in an accepted price. *Infra*, p. A-5. The court also clearly indicates that if Shell's contention as to the unenforceability of the Atlantic con-

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enforceability of the Atlantic contract but that the issue is immaterial because the parties to that contract treated the contract as binding and that it is not for Shell, a stranger to the contract, to say that it was not legally enforceable. However, the Commission suggested that should we reverse the decision of the Court of Appeals, premised as it is upon the assumption that the 1943 Atlantic contract imposed a binding obligation for its entire stated term, and if we considered the question of enforceability to be material, we should remand the issue of enforceability to the Court of Appeals for its decision. Shell has maintained in this Court that the issue of enforceability is material but, in view of the Commission's statement has argued neither that issue nor the issue of enforceability. We agree that it is appropriate that the Court of Appeals address itself to the enforceability issue, if it is material, but under the circumstances we think the Court of Appeals should first decide the question of materiality.[11] We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion."

"[11]. We do not read the following statement of the Court of Appeals as foreclosing the Commission's argument that the issue of enforceability is not material:

" 'We have assumed without deciding that the Atlantic contract of 1943 did in fact impose a binding agreement-to-agree on the price for gas in each of the contract's last four five year periods. Thus it has not been necessary to determine the several questions raised in connection with the arguments directed to that phase of the case. Of course if the Atlantic contract of 1943 was not a binding agreement-to-agree, that circumstance alone would place the February, 1954 Atlantic contract fully within the terms of the escalation clause in the Shell contract.' 263 F. 2d, at 226."

tract is correct, then the February 1954 agreement satisfied the Shell clause, *infra*, p. A-2, fn. 3.

The Court of Appeals appears to resolve the issue on the basis of federal substantive law which it characterized as "general contract doctrine", rather than upon the basis of the law of Louisiana. With such general contract doctrine as its basis, the Court reasoned that by the mere presence of an arbitration clause in the Atlantic contract "* * * the parties accept a definite standard under which the gas price will be established directly within the contract area", *infra*, p. A-6.

With reference to our contention that Louisiana law governed the enforceability issue, the Court of Appeals stated (*infra*, p. A-7):

> "Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard."

Reasons for Granting the Writ.

1. The Question of What Law Governs the Enforceability of a Privately Negotiated Gas Sales Contract On File as a Rate Schedule with the Federal Power Commission is of Major Importance in the Administration of the Natural Gas Act and in the Applicability of Federal Substantive Law as Against State Law.

Since mid-1954 when this Court decided *Phillips Petroleum Company* v. *Wisconsin*, 347 U. S. 672 (1954), thousands of independent producer gas sales contracts have been filed

as "rate schedules" with the Federal Power Commission. The interpretation and enforceability of such "rate schedules" have been and will continue to be the subject of controversy before the Commission and the Courts. In fact, the recurrence of such questions before the Commission was urged by respondents in support of their successful petitions for writs of certiorari previously filed in this very case.[5]

The question of what law was applicable was strenuously argued to the court below. The respondents strongly urged that the question presented was a federal question which should be resolved in accordance with federal substantive law. This contention was based primarily upon the circumstance that a federal agency (Defense Plant Corporation) was initially a party to the Atlantic contract, hence any question arising at any time as to the interpretation or enforceability of that contract presented a question which should be resolved pursuant to federal substantive law. In this connection respondents relied primarily upon *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943) and *American Houses, Inc.* v. *Schneider*, 3 Cir., 211 F. 2d 881 (1954). Respondents also relied upon the Federal Arbitration Act, 9 U. S. C. §§1-14.[6] Shell has contended throughout that Louisiana law governed.

The Commission itself discussed the conflict of laws question in its order. It appears to have felt that the law of the District of Columbia should govern (R. 140-141,

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[5] See note ** pp. 6-7 of Petition for Writ of Certiorari, *Texas Gas Transmission Corp., et al.* v. *Shell Oil Co.*, No. 167, October Term, 1959; and note 13, p. 13 of Petition for Writ of Certiorari, *F. P. C.* v. *Shell Oil Co.*, No. 170, October Term, 1959.

[6] Brief for Federal Power Commission in court below, pp. 13-20; Brief for Texas Gas *et al.* in court below, pp. 27-30. Respondents also contended below that they should prevail even if Louisiana law applied, but their principal contention appears to have been that the question should be resolved in accordance with federal substantive law.

and footnote 4), although it did state that it would reach the same result even if it applied the law of Louisiana (R. 141).

The Court of Appeals appears to have rejected, or deemed unnecessary to decide, our contention that Louisiana law governed. Rather, the court below based its conclusion on its conception of federal substantive law which it characterized as "general contract doctrine", and then erroneously assumed that it was unnecessary to discuss whether Louisiana law controls, because it said that in this instance Louisiana law does not differ from "general contract doctrine", *infra*, p. A-7.

We shall show later (*infra*, pp. 12-21) that the court below was seriously mistaken in its conception of the law of Louisiana. But primarily the question which we ask this Court to review is whether federal substantive law or State law should govern in determining the enforceability of a contract which is to be wholly performed in the State of Louisiana and which is on file with the Federal Power Commission as a rate schedule.[7]

The decision below stands as authority for the proposition that federal substantive law, or some nebulous general common law, rather than the law of the State of performance, governs the enforceability of a contract on file with the Commission as a rate schedule. This precise issue—although of far-reaching importance—has not been, but should be, resolved by this Court.

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[7] The doctrine of the *Clearfield* case, *supra* (318 U. S. 363) has no application here, as the federal agency had completely divested itself of all interest in the Atlantic contract long prior to the February 17, 1954 agreement. See *Bank of America* v. *Parnell*, 352 U. S. 29 (1956). Nor does the Federal Arbitration Act, even if applicable, settle the outcome if Louisiana law applies. At most, that Act would assure arbitration but would not assure fixing of price. Under Louisiana law the Atlantic contract was subject to a suspensive condition despite the assurance of arbitration, *infra*, pp. 15-21.

2. To the Extent the Court of Appeals Considered Louisiana Law, Its Decision is in Direct Conflict with the Decisions of the Supreme Court of Louisiana, with the Provisions of the Louisiana Civil Code, and with Established Principles of Civil Law which Apply in Louisiana.

The general importance of the question of what law—federal substantive or State—governs enforceability of a rate schedule on file with the Commission should, of itself, warrant granting the writ. Equally significant, however, is the fact that the court below assumed that Louisiana law is the same as "general contract doctrine", *infra,* p. A-7. The Court of Appeals reasoned that the mere presence of the provision for arbitration in the Atlantic contract made that contract enforceable as a contract to sell gas for each of its five-year periods after the first. That conclusion is contrary to the rule in Louisiana and if permitted to stand will likely result in conflicting decisions by federal and state courts, because as will be shown, the precise question is pending before the Louisiana court in a case between Shell and Texas Gas, intervenor here, involving the same contract applicable to the period prior to June 7, 1954.

Throughout this litigation Shell's principal contention has been that the law of Louisiana governed the enforceability issue, because Louisiana is the place of performance and the place where all material factors attending the Atlantic contract take place. The contract is a contract to sell certain daily quantities of gas having its situs in Louisiana and to be produced and delivered in Louisiana. Under Louisiana law it is abundantly clear that the Atlantic contract was not enforceable for any of its five-year periods after the first, because there was no fixed and determined price, hence the contract was subject to a "suspensive" condition, *infra,* pp. 15-21, and was of no

effect whatever, for any purpose, until the price was actually fixed. When that was accomplished by virtue of the February 17, 1954 agreement, a contractual obligation to sell and to buy gas was created. Such agreement fully satisfied the Shell price escalation clause.

The law of Louisiana is unique, having its foundation in the civil law of Rome and France.[8] That law requires that in a contract of sale (a sale) or in a contract to sell, the price must be certain, that is, fixed and determined. Neither a purported sale nor a purported contract to sell is enforceable or of any legal effect until the price is fixed, and that is true even though the contract contains an enforceable arbitration clause.

Under Louisiana law the same requirement as to price applies to contracts to sell as applies to sales, and the term "contract of sale" means "sale".[9] The Louisiana Civil Code[10] makes this clear in LSA-C. C. Art. 2439 which provides:

> "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.
>
> "Three circumstances concur to the perfection of the contract, to wit: the thing sold, *the price* and the consent." [10a]

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[8] The Cival Code of Louisiana is based upon the civil law of Rome and France. See, *Viterbo* v. *Frielander*, 120 U. S. 707 (1887). The Articles on sales and contracts to sell, with which we shall deal, are taken, except for minor verbal changes, from the Code Napoleon of France. See Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 Louisiana Law Review 378 (1942), discussed *infra*.

[9] Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. Law Rev. 378, 381, n. 15.

[10] The Louisiana Civil Code is cited herein as LSA-C. C., followed by the Article number.

[10a] Emphasis supplied here and throughout.

The term "promise to sell" does not refer to a sale, but, as the term indicates, refers to a contract to sell, and such a contract is not enforceable or effective until the price has been agreed upon. LSA-C. C. Art. 2462 makes this clear:

> "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, *the price* and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same."

The same is true of a sale. LSA-C. C. Art. 2456 reads:

> "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid."

LSA-C. C. Art. 2464 states, in part:

> "The price of the sale must be certain, that is to say, fixed and determined by the parties."

In LSA-C. C. Art. 1764 it is provided:

> "All things that are not forbidden by law, may legally become the subject of, or the motive for contracts....
>
> "1. That which is the essence of the contract, for the want whereof there is either no contract at all, or a contract of another description. Thus a price is essential to the contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange."

The Louisiana courts have adhered rigidly to the requirements of these Articles.

In *Patton's Heirs* v. *Moseley*, 186 La. 1088, 173 So. 772, 774 (1937), the Court held:

> "In the contract of sale it is essential that the price be certain—fixed and determined between the parties. Civil Code Arts. 1764, 2439, 2464, *Wise* v. *Guthrie*, 11 La. Ann. 91; *Prude* v. *Morris*, 38 La. Ann. 767; *Pulford* v. *Dimmick*, 107 La. 403, 31 So. 879."

We do not maintain that in a contract of sale (a sale), or in a contract to sell, Louisiana law does not permit the price to be left to the arbitration of a third person. LSA-C. C. Art. 2465 recognizes that this can be done. But in such event, the sale or the contract to sell does not come into existence and is of no effect whatever until the arbitrator actually fixes the price. LSA-C. C. Art. 2465 provides:

> "The price, however, may be left to the arbitration of a third person; but *if such person can not, or be unwilling to make the estimation, there exists no sale.*"

Under the Louisiana law, the 1943 Atlantic contract, since it did not provide a fixed and determined price, was clearly subject to a "suspensive" condition which prevented the contract to sell from coming into effect as to each of its five-year periods after the first until the condition was performed.[11]

It is true that in the Atlantic contract the price issue could be arbitrated provided some act of volition was exercised by one of the parties who might see fit to invoke

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[11] The Louisiana and civil law "suspensive condition" is similar to the condition precedent at common law. *City of New Orleans* v. *Texas & Pacific Ry.*, 171 U. S. 312, 334 (1898).

the arbitration procedure.[12] Arbitrators were not named in the Atlantic contract, nor did either party seek to invoke arbitration. Even if arbitrators were subsequently appointed by the parties, there is no certainty at all that they would ever be able or willing to fix a price, or that *the required majority of the three* would ever decide upon the same price. The Commission expressly recognized, as it must, that this could be so (App. 156).[13]

It is evident that the primary event (agreement upon price) and the alternative event (price agreement by arbitrators) upon which the contract was conditioned in order to become effective after August 31, 1953, was each at least uncertain, thus making the future buyer-seller contractual relationship dependent upon a suspensive condition. That being so, no legally enforceable or effective contract to sell gas after August 31, 1953 came into existence until the condition was furnished by the agreement fixing the price.

The Louisiana Civil Code defines the "suspensive" condition and the effect flowing therefrom as follows:

LSA-C. C. Art. 2021 provides:

> "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is

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[12] The arbitration procedure could be put into effect only if one of the parties designated its arbitrator and so notified the other. Nor could a court name the arbitrators. The Senior Judge of the 5th Circuit was empowered to designate a third arbitrator only in the event the other two could not agree upon a third (see footnote 3, *supra*).

[13] In its order denying rehearing the Commission said (R. 156): "Shell points to the possibility that the arbitrators, even if properly appointed, may not agree on a price. We must assume this is a possibility, but that does not mean that there exists no contractual right to go to arbitration in order to have the price determined." In this respect the Commission confuses the availability of arbitration with a legally enforceable contract to sell gas. The Court of Appeals fell into the same error.

> not to take effect until the event happens, it is a suspensive condition; if the obligation take effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.'"[14]

LSA-C. C. Art. 2043 reads:

> "The obligation contracted on suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without it being yet known to the parties.
> "*In the former case, the obligation can not be executed till after the event . . . .*"

LSA-C. C. Art. 2471 treats specifically of a sale made dependent upon a suspensive condition. That Article states:

> "A sale, made with a suspensive condition, does not transfer the property to the buyer, until the fulfillment of the condition."

In *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co.*, 121 La. 152, 46 So. 193 (1908), the Louisiana Supreme Court reviewed the law on suspensive conditions, including an analysis of the Roman and French law from which the foregoing Codal Articles are taken, saying (46 So. at p. 197):

> ". . . When a sale is made under a suspensive condition, *there is no sale until the condition has been fulfilled . . .*

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[14] The term "obligations" as used in the Louisiana Civil Code is synonymous with contract. *Morgan's La. & T. R. & S. S. Co.* v. *Stewart*, 119 La. 392, 44 So. 138, 143 (1907): "Civil obligations . . . are of two kinds: (1) . . . , (2) Such as arise from the consent of the parties who are bound by them which are called contracts or conventional obligations". See also 58 C. J. S., *Modern Civil Law*, p. 840, "The law of obligation has a broader meaning in the civil law than in the common law in that 'it signifies rights as well as duties . . .' ."

> "Article 2021 of the Code says that an obligation under a suspensive condition 'cannot take effect,' and article 2043, that it 'cannot be executed,' until after the happening of the event upon which it depends. *By this is meant that the obligation cannot have any effect whatever, for any purpose; in other words, that, strictly or logically speaking, it does not exist.*
>
> "From the days of Justinian, the civilians have recognized that an obligation contracted under a suspensive condition, or condition precedent, does not exist before the fulfillment of the condition . . ."

After quoting from the Roman authorities, the Court continues (46 So. at p. 197):

> "Thus it is seen that in such a case the debt, or, in other words, *the contract, or the sale, does not come into existence until the happening of the condition; and that in the meantime there is only a hope that it will come into existence.*"

As has been shown, a contract to sell or a sale requires the price to be fixed and determined by the parties. LSA-C. C., Art. 2465, says the price may be left to the arbitration of a third person, "*but if such person can not, or be unwilling to make the estimation, there exists no sale.*" These words will instantly impress anyone as meaning that there can be no sale or contract to sell until the arbitrator acts; otherwise, the emphasized phrase is meaningless.

Thus the provisions of the Louisiana Civil Code and the jurisprudence of that State leave no room for doubt that the fixing of the price, even where it is left to the arbitration of a third person, is an absolute condition the satisfaction of which is prerequisite to the existence of the contract to sell or to a sale. It is the fixing of the price, when that ment is left to future agreement or arbitration, which supplies the condition. Without it, the Court says in *Barber*

Asphalt, supra, the contract "*cannot have any effect whatever, for any purpose*" (46 So. at p. 197).

The Louisiana law on sales and contracts to sell is completely covered and exhaustively documented with Louisiana, Roman and French authorities in "*Some Problems Regarding Price in the Louisiana Law of Sales*", an article written by Paul M. Hebert, Dean and Professor of Law, Louisiana State University Law School, and Carlos E. Lazarus, Visiting Assistant Professor of Law, Louisiana State University, published in 1942 and appearing in 4 Louisiana Law Review 378-418. This treatise demonstrates the following principles applicable in Louisiana:

> (a) There cannot be a valid sale or contract to sell unless the parties have agreed to a fixed and determinate price (p. 388);
>
> (b) Where ascertainment of price is left to future agreement of the parties or to be fixed by third persons, the price is not fixed or determinate, but is dependent upon a suspensive condition (pp. 379-380, 396-399, 402, 403, 409);
>
> (c) Where the price is to be fixed by agreement of the parties or by third persons not named in the act, and thus is subject to a suspensive condition, no sale or contract to sell exists until the parties have actually agreed upon the price or the third parties have actually fixed the price (pp. 402-404).

Dean Hebert and Professor Lazarus, after pointing out that under the Roman law there could be no sale unless the price was fixed with certainty, state (p. 380):

> "It is significant that the modern civil law of sales, as embodied in the Code Napoleon and in its offspring the Louisiana Civil Code, still adheres to * * * basic principles of Roman law."

A section of the article is devoted to "*Determination of Price by Parties or by Third Persons*" (p. 396). After observing that LSA-C. C. Art. 2464 requires the price to be "fixed and determined" and that Art. 2465 provides that price "may be left to the arbitration of a third person", the writers ask whether the latter Article is an exception to the former. In other words, is the requirement of a price fixed and determined "*by the parties*" (LSA-C. C. Art. 2464) dispensed with when the contract provides that the price is to be left to the arbitration of a third person as authorized by Art. 2465? With the French law as their authority, the authors answer this question as follows (p. 397):

> "At first blush, it would seem that Article 2465 makes an exception to Article 2464, but upon closer examination it is clear that it is only the parties themselves who may fix the price for they alone are the parties to the contract. It cannot be logically contended that a stranger to the contract could dictate the price which would be binding on the parties unless they had so agreed, that is, unless they had appointed him for the purpose of fixing the price. The third party is thus the mandatary of the parties, and as such, his act in fixing the price is the act of the parties themselves."

The article continues (p. 397):

> "Ordinarily the stipulation leaving the price to the arbitration of a third person also names the person or persons charged with that duty, and in such a case the parties are bound by the contract for whatever price the appraisers shall fix. *However, the appraisers may not be able or may even refuse to fix the price, in which event Article 2465 provides that there is no sale. Thus the sale is subordinated to the condition, suspensive in character, that the*

price shall be fixed and as long as the price remains undetermined the sale remains inoperative."

It is thus clear that if Atlantic and the pipeline had been unable to finally trade out and agree upon a price as they did, and had the matter instead been submitted to arbitration, an effective contract to sell could not have come into existence unless and until the arbitrators had actually fixed the price. But there is no assurance that that would ever have come to pass. And under Louisiana law it is clear that the contract was of no effect whatever, for any purpose, until the price was actually fixed. Therefore, the conclusion of the Court of Appeals that the mere presence of the arbitration clause in the Atlantic contract insured the fixing of an accepted price and hence made the contract enforceable, is contrary to settled Louisiana law.[15]

3. If the Court agrees that Louisiana law governs, federal court action should be held in abeyance until the issue of enforceability is resolved by the Louisiana court in a pending case between Shell and Texas Gas involving that very issue. Otherwise, there may be a conflict between Federal and State decisions.

There is now pending in the State court of Louisiana a case between petitioner and Texas Gas[16] wherein the precise issue remaining to be decided here, assuming Louisiana law governs, will be among those to which the State court

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[15] See also, *Lake* v. *LeJeune*, 226 La. 48, 74 So. 2d 899 (1954), in which the Supreme Court of Louisiana held that an option to purchase was a *nullity* because of the absence of a fixed and determined price, even though the option purchase contract contained a provision for the appointment of appraisers and the court construed the contract to mean that *either* party alone could designate the appraisers.

[16] *Shell Oil Company* v. *Texas Gas Transmission Corporation*, No. 392-748 on the docket of Civil District Court for the Parish of Orleans, State of Louisiana, filed in July, 1961.

will be required to apply the statutes and laws of Louisiana. Here the question is the price of gas under the Shell contract on June 7, 1954, the date as of which the Federal Power Commission assumed jurisdiction of sales by independent producers. In the State court, Shell sues for $117,584.85, representing the difference between 12.5 cents per Mcf, the escalated price, and 8.997 cents per Mcf, the price before escalation, for all gas delivered to Texas Gas from September 1, 1953 to June 7, 1954. The prior price agreement under the Atlantic contract terminated August 31, 1953 and Shell claims escalation was activated by the agreement on price between Atlantic and Texas Gas dated February 17, 1954 for the period starting September 1, 1953. In order to pass on Shell's demand, the Louisiana court must determine in accordance with Louisiana law the very question of enforceability which this Court found remaining for determination in this case.

The applicable State law is a rule peculiar to Louisiana and is fully set forth in the Articles of the Louisiana Civil Code quoted in other parts of this petition. Those Articles taken literally make clear to us that the agreement of February 17, 1954 activated the Shell escalation clause. If, however, in light of the foregoing authorities, any question as to applicable Louisiana law can possibly be considered unresolved, we respectfully submit that the question should be passed upon and determined by the Louisiana court.

The case pending in Louisiana will in any event move forward to final determination by the Louisiana Supreme Court. The decision by a Federal court with a later decision by the Louisiana court, possibly arriving at a contrary conclusion, would bring about the area of friction between the State and Federal judiciaries which this Court

has said should be avoided. *Leiter Minerals, Inc.* v. *United States,* 352 U. S. 220 (1957).

We are mindful that there is no constitutional question involved here. We are also mindful that this Court has refused, in diversity of citizenship cases, to allow the difficulty of an issue of State law to deter it from deciding the case. *Propper* v. *Clark,* 337 U. S. 472 (489) (1949). That principle is no obstacle to the course we ask the Court to pursue here; for in diversity cases a litigant has a choice of forum and his choice of the Federal forum would be frustrated if the Court should seek to refer issues to the State Court.

This suggestion is in accord with the action of the Court in *Thompson* v. *Magnolia,* 309 U. S. 478 (1940), where the court, in bankruptcy litigation, referred to the Illinois State court the issue of whether certain instruments were grants of easements or transfers of fee title. Here, as there, we have but a single issue of law to be decided. There may have been other issues present in this case but there is left only the one remaining issue of whether termination of a price period terminated or suspended the enforceability of the contract until a new price was arrived at by agreement or arbitration. We need no excision of issues by the Court for reference to the State court.

Even more important, here as in the *Magnolia* case, the determination of the issue of State law is an accident of Federal jurisdiction rather than of part of the essence of its responsibility imposed upon it by Congress. In diversity cases and federal question cases Congress must of necessity have realized that issues of State law would be presented for resolution by the Federal courts in exercise of the jurisdiction conferred upon them by the Judiciary Act. 28 U. S. C. 1331. That is not so in bankruptcy

jurisdiction where the Court's chief function is to pass upon claims of bankruptcy, marshal the assets, arrange the order of creditors, and the like, and questions of State law are usually incidental to its function and are accidents of its Bankruptcy jurisdiction. Similarly, the Federal Power Commission by the Natural Gas Act was given jurisdiction to regulate the transportation and sale of natural gas in interstate commerce for resale. This case involves no exercise of the expertise by the Federal Power Commission or review thereof by the Federal courts as was decided by this Court when this case was previously before it. Therefore, this issue of State law can await State court determination without in any respect abrogating the supervisory powers of Federal courts in determining that the Federal Power Commission is properly carrying out its function.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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Opinion of U. S. Court of Appeals, Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS & ELECTRIC COMPANY,

Intervenor-Respondents.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

Argued April 18, 1961

Before: GOODRICH, McLAUGHLIN and STALEY, *Circuit Judges.*

Opinion of the Court.

(Filed June 15, 1961)

By McLAUGHLIN, *Circuit Judge.*

The Supreme Court upheld our jurisdiction to determine the question of the proper interpretation to be given the "favored nation" clause of the 1951 contract between petitioner and Texas Gas in dispute here. It disagreed with our construction of the agreement, holding that the clause does not effect an increase in price by reason of the February 17, 1954 Texas Gas agreement with Atlantic.[1]

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[1] *Texas Gas Corp.* v. *Shell Oil Co.*, 363 U. S. 263 (1960).

The case was therefore reversed and remanded to us for decision first, whether the enforceability issue is material and second, if it is, to pass upon its merits.

The answer to our first inquiry is simply arrived at. We had assumed without deciding that the basic 1943 contract between Atlantic and the predecessor of Texas Gas was enforceable and held that the 1954 agreement was a separate contract.[2] The Supreme Court, necessarily under the same assumption, viewed the 1954 transaction as merely a price adjustment within the 1943 agreement. If a price agreement for the third 1943 contract period was not enforceable under that contract when the second one expired on August 31, 1953, the February 1954 agreement between Atlantic and Texas Gas brought into play the Shell-Texas Gas raise in price clause. Such conclusion would of course not be in conflict with the referred to opinion of the Supreme Court. It follows that the question of whether the 1943 contract was enforceable with respect to the 1954 price agreement, is most material.[3]

Petitioner contends that the 1943 contract between Atlantic Refinery Co. and Louisiana, as successor to Defense Plant Corporation, was severable and by itself, not controlling beyond its first five year period. For that time the agreed price for gas received by the buyer was 2.2¢ per Mcf. The below quoted language from Paragraph 3 dealt with the prices for the balance of the twenty-five year contract:

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[2] *Shell Oil Co.* v. *Federal Power Commission*, 263 F. 2d 223 (1959).

[3] It is argued that the issue is not material because Atlantic and Texas Gas treated the 1943 contract as binding and that it is not for Shell, a stranger to the contract, to say it was not legally enforceable. Shell's position is that the 1954 agreement between Texas Gas and Atlantic is the type contract specifically noted in its 1951 agreement with Texas Gas which would activate the escalator clause of that obligation. Its contention forces examination of the 1943 document. Should that examination reveal that the agreement does not legally control the determination of the price of the contract gas for the third five year period, Shell receives the strongest possible support in its construction of the 1954 contract.

"(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

"(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

"(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII."

The pertinent arbitration provisions of Condition XII read:

"XII. * * * The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrators shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of said parties to the arbitration.